decisions comes to the conclusion that the exceptional rule does not apply to the government and especially in view of the statutes relative to the issuing of pension checks, and that the defendant's indorsement of the checks being a warranty of their genuineness no demand or notice before bringing suit for the repayment of the checks was necessary. The court refrained from expressing any opinion whether or not the facts presented a case of mutual mistake. In *United States* v. *Nat. Park Bank,* 62 Fed. 825, where the facts were quite similar to the principal case a recovery was allowed upon the theory, that the payments were made under a mutual mistake of fact. The principal case is in accord with *Merchants Bank* v. *Marine Bank* 3 Gill 96, 43 Am. Dec. 300; *White* v. *Continental Nat. Bank,* 64 N. Y. 316; *United States* v. *Onondaga County Sav. Bank,* 39 Fed. 259; *Onondaga County Sav. Bank* v. *United States,* 64 Fed. 703. The decision no doubt will have a tendency to make banks more careful in the payment of government pension checks. W. J. B.

DAMAGES RECOVERABLE ON STOCK BROKER'S FAILURE TO PURCHASE AS DIRECTED.—Whether it be due to a lack of available securities of a more tangible sort, to the urgencies which arise in modern business, or to other economic conditions pertinent to the present order, it must be apparent to those even casually connected with the business world that there is a constantly increasing amount of investment in stocks and bonds and that this condition is fraught with great importance from a legal aspect. Breach of contract, failure of duty and breach of trust in the fiduciary relations of the agent, or broker as he is generally known, having money of his principal or client to invest, give rise to many actions for damages and the courts are constantly engaged in enforcing reparation to the injured party.

It is so fundamental in the law of damages as to require no cited authority that the law aims at a reparation of the injured party, an indemnity of his wrong and a compensation for his loss. Where there exist no special facts which will permit him to collect exemplary damages, in jurisdictions where such are assessable, he will not be permitted to do more than make himself whole. In actions for breach of contract the rule in *Hadley* v. *Baxendale,* 9 Exch. Rep. 341, is, with modifications to fit particular situations, quite universal. In the absence of any special circumstances the damages for a breach of contract are such as may "reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of a breach of it." In actions *ex delicto* a somewhat broader rule applies as to the details of proving the damage but in general the damages assessed must be compensatory merely. *Allison* v. *Chandler,* 11 Mich. 542. For breach of contract to deliver stock the damages should not be reckoned by what it costs the defendant to perform but rather the detriment to the plaintiff, i. e., the value of the stock, its pecuniary equivalent or the stock itself together with any special damage. *Barnes* v. *Brown et al.,* 130 N. Y. 372.

Rather an extraordinary assessment of damages is to be observed in the case of *Wahl* v. *Tracy et al.,* — Wis. —, 121 N. W. 660. The plaintiff, a

surgeon who was unfamiliar with stock dealing, gave to the defendants as his brokers the sum of $12,800 for immediate cash investment in a specified stock at the prevailing market price or lower if obtainable. The defendants, in violation of their instructions, ordered the stock from another broker on a margin and paid $3,000 of the plaintiff's money to cover. Representing to the plaintiff that they had purchased the stock outright and that it could not be delivered to him until after some considerable delay in obtaining a transfer on the books of the company, the defendants used the remainder of plaintiff's money in their own business and the stock, purchased on margin with the plaintiff's money and represented by certificates made out in blank, they pledged as security for their own obligations. Some weeks later plaintiff, having learned of the fraud, demanded his stock which, as soon as the entanglements could be removed, was delivered to him. It had depreciated $1,200 in value from the time of the purchase on margin to the time of the last demand. Upon suit for damages the Supreme Court of Wisconsin allowed him this difference as compensation for his injury.

The theory upon which the recovery was allowed, as was stated by Mr. Justice Dodge who delivered the prevailing opinion, rests upon a breach of the fiduciary relation existing between the broker and his client. By accepting the commission defendants became the agents of the plaintiff and, being entrusted with his money for a special purpose, they necessarily assumed and owed toward him the fiduciary duties of good faith and due diligence in carrying out his instructions. *Islam* v. *Post,* 141 N. Y. 100, *Hill* v. *American Surety Co.,* 107 Wis. 19, Dos PASSOS, STOCK BROKERS, pp 207, 218. It therefore became their duty to purchase the shares in question at the best price obtainable. *Taussig* v. *Hart,* 58 N. Y. 425, *Larrabee* v. *Badger,* 45 Ill. 440. Upon a breach of this duty the measure of damages is the value of the stock at the time and place of proper delivery and the delivery of the stock can act only in mitigation of damages by way of counterclaim. *Taussig* v. *Hart,* 49 N. Y. 301,*Thompson* v. *Kissel,* 30 N. Y. 383. At the time the purchase was completed and after the purchase price had deteriorated defendants had discharged their trust and no sooner. Being bound to purchase at the best obtainable price they became responsible to plaintiff for the amount of the slump.

To maintain this theory of recovery it is essential that the purchase be deemed not completed until the purchase price was paid for the shares, or in other words, that the purchase on margin be deemed not such a purchase for and in behalf of the plaintiff as to vest title in him immediately. It is obvious that if the legal title vests immediately in him the brokers' duty in regard to finding a "best price" is discharged. There is ample authority, however, that this contention cannot successfully be maintained but that rather upon a purchase of stock on margin for a client the title vests in him immediately and he becomes the owner thereof, the relation of bailor and bailee arising between the two when the agent or broker keeps the certificates of the stock in his possession. *Markham* v. *Juadon,* 41 N. Y. 235, *Baker* v. *Drake,* 53 N. Y. 211, *Skiff* v. *Stoddard,* 63 Conn. 198, *Nourse* v. *Prime,* 4 Johns. Ch. 490, *Horton* v. *Morgan,* 19 N. Y. 170, *Le Marchant* v. *Moore,*

150 N. Y. 209. It is true that the act of purchasing the stock on margin was unauthorized and irregular, but had the plaintiff wished to avail himself of this fact, as Mr. JUSTICE MARSHALL, dissenting, points out, he should have repudiated the transaction for irregularity in the purchase and the pledging back of the shares, recovered his money from the brokers and purchased the stock on the market at the then market price, or, after having repudiated the purchase, have received the stock in mitigation of the damages. *Baker* v. *Drake,* supra. But failure to repudiate operates as a ratification. *Clews* v. *Jamieson,* 182 U. S. 461, 21 Sup. Ct. 845. Ratification may be presumed from the acts of the parties and if a principal knowingly appropriate the fruits of his agent's act he will not be heard to say afterwards that the act was unauthorized. *McDermott* v. *Jackson,* 97 Wis. 64, MECHEM, AGENCY, §§ 146, 148, *Hyatt* v. *Clark,* 118 N. Y. 536, *Jones* v. *Atkinson,* 68 Ala. 167, *Thatcher* v. *Pray,* 113 Mass. 291, *Mayer* v. *Dean,* 115 N. Y. 556.

But whether the purchase for the plaintiff be considered as consummated at the time of the purchasing on margin or at the later time of complete and full payment is of no importance in this case. "No maxim is better settled in the law of agency than the maxim *omnis ratihabitio retrotrahitur, et mandato priori equiparatur,*" that ratification is equivalent to prior authority, where rights of innocent third parties do not intervene. Story, J., in *Fleckner* v. *Bank of U. S.,* 8 Wheat, 338, *Cook* v. *Tullis,* 18 Wall, 332, *McCracken* v. *San Francisco,* 16 Cal. 591. If the principal elects to ratify he must ratify *in toto.* MECHEM, AGENCY, §130, *Trixione* v. *Tagliaferro,* 10 Moo. P. C.C. 175, *Eberts* v. *Selover,* 44 Mich. 519, *Wheeler* v. *Sleigh Co.,* 39 Fed. 347, *Baldwin* v. *Burrows,* 47 N. Y. 199. An agent whose act is thus ratified is relieved from his dilemma of responsibility. MECHEM, AGENCY, § 170, *Wilson* v. *Dame,* 58 N. H. 392, *Bank* v. *Bank,* 13 Bush 526, *Hazard* v. *Spears,* 4 Keyes 469, *Szymanski* v. *Plasson,* 20 La. Ann. 90.

In the light of the cardinal rule of damages in actions of this nature, that the plaintiff is to be compensated merely for his loss, it must appear that he is not entitled to his recovery in this case. He was not damaged to that amount nor in that manner nor do the defendants hold the amount recovered as ill gotten profits to the plaintiff's use. By completing the purchase of the shares which they held on margin they paid out precisely the sum necessary to have bought the shares outright at the beginning. It will be observed that the plaintiff received the specified shares for exactly the amount he expected to pay, the lowest price for which they could be obtained at the time of giving the order. Whether it be considered that the purchase on margins was in reality a purchase for the plaintiff which was affirmed by his subsequent ratification, or whether it be considered that the ratification of the completed purchase related back to the first act of the brokers and exonerated them as to irregularity in the whole transaction, it must be apparent that he is not entitled to receive the exact article contracted for, at the exact price he contracted to pay and then collect as damages in a law-suit from his brokers the amount of depreciation of the stock which, by proper action on his own part, he might have availed himself of.

J. T. C.